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# Supreme Court of the United States.

OCTOBER TERM, 1900.

*No. 355.*

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

*vs.*

WIRT ADAMS, STATE REVENUE AGENT.

## BRIEF OF DEFENDANT IN ERROR ON THE MERITS AND IN REPLY TO BRIEF ON BEHALF OF PLAINTIFFS IN ERROR FILED OCTOBER 12, 1900.

F. A. CRITZ,
R. C. BECKETT,
*Attorneys for Defendant in Error.*

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, A. D. 1900.**

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THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

*vs.*

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

## BRIEF OF DEFENDANT IN ERROR ON THE MERITS AND IN REPLY TO BRIEF ON BEHALF OF PLAINTIFFS IN ERROR. FILED OCTOBER 12, 1900.

We must confess that counsel for plaintiffs in error do get up a most insinuating and plausible brief, and worthy of a better cause. The only trouble is that they are forced by

the exigencies of the case to assume as the basis of their arguments premises which do not in fact exist.

**First.**

Under their first head, page 5, we admit that the decision of the State court that the Lambert case is not *res adjudicata* does not dispose of the whole case. Our argument on that point, and the third plea, is simply that such decision raises no Federal question, and hence is not to be considered by this court on the question of jurisdiction.

**Second.**

Under their second head, on pages 6–8, they endeavor to create the impression that we are seeking to get this court to overrule the State supreme court on questions "of local practice and procedure." The defendants filed a plea of performance. We replied with a replication of *res adjudicata*. The circuit court sustained our replication. The supreme court held that it was not necessary for it to pass on this replication, because the plea was bad and extended the demurrer back to the plea, but closed the opinion with this emphatic ruling: "The judgment, however, arrived at was right and must be affirmed" (Rec., p. 232).

In this connection, on page 21 of our brief, we referred to Baker *vs.* Grice, 169 U. S., 291, 292, to show that it is a fixed rule of this court not to pass on a Federal question if there is any other properly in the record which is decisive of the case, and then asked the court to apply its own rule of practice and procedure, and pointed out that it did not conflict with the decision of the State supreme court. In fact the

State supreme court had established for itself in Adams *vs.* Bank, 74 Miss., 316, 317, the same identical rule laid down in Baker *vs.* Grice, but failed to follow it in this case obviously for the reason that it did not consider that their former opinion involved any Federal question. In the "First Point," on pages 11–19 of our brief, we have endeavored to show that the court was right in this comprehension of the case, and then argued in our "Third Point" that if this court differs with the State court and thinks that the former opinion does involve a Federal question, then that this court will not decide it, but will enforce its own rule, and also the rule which the State supreme court would evidently have itself followed if it had thought that exending the demurrer back raised any *bona fide* Federal question. It said, "The judgment, however, arrived at was right and must be affirmed," and it is clear that we do not ask this court to overturn any rule of local practice, but, on the contrary, that we ask it, if it differs with the State court on a question of law as to whether the former opinion of the State court raises any Federal question, that then it will follow, not only its own rule, but the rule of the State court, and hold that the former decision does not *now* raise any Federal question because it is *res adjudicata* in this case.

**Third.**

In their third point, on pages 8 and 9, counsel say that apparently we do not dispute the fact that these suits and the decision give effect to subsequent statutes, and make a quotation from page 25 of our brief to the effect that "said exemption was repealed by the laws of 1886 and 1890 and

the Code of 1892." We submit that this is hardly fair. What we did say was that our replication set up that this was one of the things that had been decided in the former suit, and that it was *res adjudicata*, and not that it did or did not give effect to any subsequent law. The expression on said page 25 of our brief is not as plain as it might be, in saying that the five things pleaded in the replication were "fully sustained by the opinion of the court," but it is not difficult to see that we meant, were sustained by the opinion of the court in the former suit, and not in this case, because we were pleading what the court decided in the former case, and naturally proposed to verify it by the opinion in that former case, which was the only possible way to verify it.

## Fourth.

In the brief of opposite counsel, in the first point on the merits, on page 10, they still assert that the Mississippi Mills case was expressly overruled, and hence can have no effect as a precedent. It is hard to answer assertion by argument, but it seems that is the only course left us. As we have shown on pages 13 to 18 of our brief, the court only overruled the part of the opinion in the Mississippi Mills case which went beyond, and was not justified by the facts, and expressly said on page 669 of the record, "In no other respect do we interfere with the decision in that case."

We cannot understand how in the face of this it can be gravely stated that "the decision in the Mississippi Mills case was expressly overruled by the Mississippi supreme court." We have explained this somewhat fuller in a late supple-

mental brief filed by us in said case No. 35, on October 12, 1900, pages 14 to 17.

And counsel are reduced to the extraordinary plight of actually contending in argument before this court that a certain legislative enactment when applied to factories is an exemption, because, factories being private enterprises, it would be unconstitutional as an appropriation, but when applied to railroads it is an appropriation, because it would be unconstitutional as an exemption. In other words, that the same identical thing can mean and actually does mean two diametrically opposite things, for such is the effect of their strange and incomprehensible logic in this regard.

We admit, and have said in our brief, that when a Federal question is fairly before this court as to whether a contract has been impaired by subsequent legislation it will examine and decide for itself whether there is a contract such as is subject to impairment, but we deny the assumption that this court ever has or ever will decide that a contract is other than the supreme court of the State has decided it to be, at the time of the grant, as against the sovereign rights and prerogatives of the State, and in the absence of any repudiation or modification by the State court itself. On the contrary, this court has held, times almost without number, that in the absence of such repudiation or modification by the State court the previous decision enters into and becomes an integral part of the contract itself, as much so as if actually written in it. The form of the exemption or appropriation in this case and that in the Mississippi Mills case are not exactly identical, but the point we make is that they are so nearly identical, using almost the same language, so

far as the essential question of whether it is an exemption or appropriation of taxes is concerned, that a distinction cannot in good faith be claimed, and this is what this court says is required, in Western Union Telegraph Co. *vs.* Ann Arbor Railroad Co., 178 U. S., 243, 244. See the two charters on pages 14 to 16 of our brief.

## Fifth.

As to the second point on the merits in their brief, on pages 12 to 15, we use their own argument under the previous head against them. It was that the contract when applied to factories must be held to be an exemption, because, factories being private enterprises, it would be unconstitutional as a donation or appropriation, and so, we say, it would be unconstitutional to hold that it was an appropriation as to railroads, because section 5 of article 12 of the constitution of December 1, 1869, provides that "the credit of the State shall not be pledged or loaned in aid of any person, association, or corporation, nor shall the State hereafter become a stockholder in any corporation or association." On this point see our main brief, filed April 7, 1900, in No. 244 of the October term, 1899, No. 35 of this term, on pages 85 to 86, and also our main brief in No. 320 of the October term, 1899, No. 79 of the present term, on pages 48 to 50, to which we respectfully invite the attention of the court. It is a rule of the common law that a grant cannot be made *in presenti* of what is not *in esse* and has no potential existence. While we speak of it as an exemption, the language of the law always is "*shall be exempt*," &c., referring to the future, and in its essence is an agreement to release the taxes when

they come into existence and become due, an agreement made in advance that the State will not collect them when and at the time it would otherwise have a right to do so; so an appropriation of taxes is an agreement that the taxes when they come into existence and fall due may be applied in a certain way. It, in whatever language couched, is in its essence necessarily an executory agreement, and as such is obnoxious to the foregoing provision that the credit of the State shall not be pledged or loaned. The *credit* means the *promise*, and an executory agreement is a promise. This would be the case if the promise was to appropriate a certain amount of taxes or the taxes from another source as all the taxes to which the Mobile and Ohio Railroad Company or some other railroad or company may be subject. So the State could donate its note or its bonds, but after all it is the donation of a promise—a pledge of credit.

But when the State agrees to appropriate the taxes on a railroad to the debts of the railroad, it is a simple travesty on thought to contend that that is an agreement to appropriate, and not in its essence an agreement to release or exempt from taxation, if the railroad company will pay a certain sum on its debts each year, to be measured by the amount of taxes it ought to pay.

## Sixth.

As to the third point on the merits in their brief, on pages 15 and 16, on the effect of the consolidation, we reiterate what was said by the court in this case, and also on pages 32 and 33 of our brief, that "we are content with the reasoning of the opinion in the main case," which is in the record

in said No. 35, on pages 638–656. It is so full and exhaustive that further elaboration would mar rather than add to its force or cogency; but we contend that this court is precluded from passing on this point, or going into the merits in any particular, by our fifth replication of *res adjudicata*.

F. A. Critz,

R. C. Beckett,

*Attorneys for Defendant in Error.*